Supreme Court, U.S.
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No. 02-442

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LAWRENCE SCIALABBA AND ROBERT T. CECHINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR UNITED STATES

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Respondents have failed to refute the government's central submission: the decision of the court of appeals warrants review because the court's interpretation of the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), contradicts its text, departs from the approach taken by other courts of appeals, and will impair the statute's effective enforcement.

In holding that "proceeds" means "profits," the court of appeals incorrectly rejected the common understanding of the term, both generally and in related statutes. Moreover, the court's reasoning that the prosecution here departed from "the normal understanding of money laundering" because it did not involve transactions that "hide or invest profits in order to evade detection" (Pet. App. 3a) disregards the statute's express prohibition of transactions made "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. 1956(a)(1)(A)(i).

The court's decision cannot be reconciled with the definition of "proceeds" adopted by the Sixth Circuit in *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), or the results and reasoning of *United States* v. *Conley*, 37 F.3d 970 (3d Cir. 1994), and numerous decisions of other courts of appeals. Furthermore, the decision subjects the government to an unreasonable burden of proof and enmeshes the courts in complicated issues concerning what accounting principles should govern illegal enterprises. As a result, the decision will significantly impair government efforts to combat serious crime.

1. The decision of the court of appeals is incorrect.

Although respondents contend that "the court of appeals did not ignore the common and primary meaning of 'proceeds'" (Br. in Opp. 5), several of the definitions on which respondents themselves rely show that the court did just that. Respondents note (*id.* at 6) that the first definition of "proceeds" in the *American Heritage Dictionary* 1398 (4th ed. 2000) is "[t]he amount of money derived from a commercial or fundraising venture." Respondents also rely (Br. in Opp. 6) on a definition of "proceeds" the initial entry of which states: "that which proceeds, is derived from, or results from something."[1] Neither of those definitions suggests that "proceeds" refers only to the money that remains after the costs of the venture are deducted. Instead, they

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[1] Respondents incorrectly identify the source of that definition as *The New Oxford American Dictionary* (2001). That dictionary actually defines "proceeds" as "money obtained from an event or activity," *id.* at 1358, which accords with the government's interpretation. The source of the definition cited by respondents is 12 *The Oxford English Dictionary* 544 (2d ed. 1989), and it refers to "profits" only as the last of its five meanings.

accord with the definitions cited in the petition (at 8-9), which indicate that "proceeds" is most commonly understood as "the *total* amount derived from a sale or other transaction." *The Random House Dictionary of the English Language* (2d ed. 1987) (emphasis added); see *Black's Law Dictionary* 1222 (7th ed. 1999). Nor are respondents aided by their observation (Br. in Opp. 6-7) that *Black's Law Dictionary* also contains a definition of "net proceeds." The money laundering statute omits the critical qualifier—"net."

Respondents cite (Br. in Opp. 5-6) only one dictionary that supports their interpretation of "proceeds." See *The Oxford Dictionary and Usage Guide to the English Language* 460 (1995). The government has not located any decision of this Court, however, that relies on that dictionary, which, according to the publisher, is no longer in print. That dictionary, published by Oxford University Press, uses British spellings and lists American spellings as variants. See *id.* at 153. *The Oxford American Dictionary and Language Guide* (1999), a publication by the same publisher that reflects "contemporary American English vocabulary" (*ibid.*) (Preface), defines "proceeds" as "money produced by a transaction or other undertaking," (*id.* at 793), which accords with the government's interpretation.

Respondents are also not assisted (Br. in Opp. 7-10) by the principle that a statute's meaning is informed by its context and purpose. In fact, those considerations support the government's position. Congress presumably intended the word "proceeds" as used in the money laundering statute to have a meaning consistent with the meaning of the same word in related criminal statutes. Just two years before Congress enacted the money laundering statute, Congress added the word "proceeds" to the RICO forfeiture statute. The Senate

Report accompanying the legislation explained that "the term 'proceeds' has been used in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were." S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). Although respondents seek (Br. in Opp. 10-11) to dismiss that powerful contextual evidence because it involves a separate statute, they offer no reason why Congress would have deviated from its approach in the RICO statute when it enacted the money laundering statute shortly thereafter.

Concerns about requiring proof of the defendant's overhead expenses apply with equal force in the money laundering context. Concepts like "net income" or "profits" have concrete meaning only after application of a system of accounting principles. But there is no source of generally accepted accounting principles for criminal enterprises. Thus, application of a "profits" approach would require the courts to undertake the novel, difficult, and essentially futile task of formulating an accounting theory for illegal businesses and the government to bear the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits." S. Rep. No. 225, *supra*, at 199 n.24 (quoting *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977)). Respondents point to nothing that suggests that Congress intended that result.

Contrary to respondents' suggestion (Br. in Opp. 7), the absence of any definition of "proceeds" in the statute provides no contextual support for rejecting the word's customary meaning. Nor does Congress's intent that money laundering be discrete from the underlying

crime (*id.* at 8-10) justify that action. The distinction between money laundering and the underlying crime is maintained by the requirement that the money laundering transaction "follow and * * * be separate from any transaction necessary for the predicate offense to generate proceeds." *United States* v. *Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); see Pet. 14-15 (citing cases). The distinctness requirement is not undermined by defining proceeds as gross rather than net receipts because there can be no receipts of *any* kind unless there has already been illegal activity that has generated those receipts.

Respondents dispute (Pet. 11-14) the government's contention that the court of appeals incorrectly assumed that the statute prohibits only transactions designed to conceal illegal activity. But the court's opinion speaks for itself: the court objected to the government's theory of prosecution because, under that theory, a "drug dealer commits money laundering by using the receipts from sales to purchase more stock in trade, [and] a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next." Pet. App. 3a. The court thought that those transactions could not constitute money laundering because they do not involve efforts "to hide or invest profits in order to evade detection, the normal understanding of money laundering." *Ibid.* The money laundering statute, however, expressly prohibits financial transactions involving the proceeds of specified unlawful activity made "with intent to promote the carrying on of specified unlawful activity" (18 U.S.C. 1956(a)(1)(A)(i)) regardless whether the perpetrator has an intent to conceal. See Pet. 11-12. Thus, the court's criticism that respondents were not "charged with reinvestment in seemingly legitimate

businesses or other means to whitewash (= 'launder') the funds" (Pet. App. 3a) overlooks the plain language of the statute. Although respondents would dismiss the court's statements as "dicta" (Br. in Opp. 13), the statements were central elements of the court's reasoning. And that reasoning cannot be reconciled with the language of the statute.

In light of the clear support for the "gross receipts" definition of "proceeds," respondents' reliance (Pet. 10) on the rule of lenity is misplaced. The rule of lenity applies only if there is such a "grievous ambiguity or uncertainty" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and ellipsis omitted). There is no ambiguity here.

2. The decision below departs from the approach of other courts of appeals.

Respondents also contend (Br. in Opp. 15-18) that certiorari is not warranted because there is no "genuine circuit split." *Id.* at 15. Respondents fail, however, to refute the government's submission that the court of appeals' decision departs from the construction that other courts of appeals have accorded the money laundering statute. See Pet. 16-21.

Respondents contend (Br. in Opp. 17) that the decision below does not conflict with the Sixth Circuit's decision in *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), because that case, unlike this one, involved a constitutional vagueness challenge. But the Sixth Circuit resolved the vagueness challenge by holding that "proceeds" means "what is produced by or derived from something (as a

sale, investment, levy, business) by way of *total revenue*." *Id.* at 1101 (emphasis added) (quoting *Webster's Third New International Dictionary* 1807 (1971)). That definition of proceeds squarely conflicts with the "net income" definition that the Seventh Circuit adopted here. Respondents' contention that "*Haun* did not squarely resolve whether the words [sic] 'proceeds' as used in the money laundering statute refers to net or gross income" (Br. in Opp. 17) is thus incorrect.

Respondents also fail to reconcile the decision below with the Third Circuit's decision in *United States* v. *Conley*, 37 F.3d 970 (1994). Respondents correctly note (Br. in Opp. 16) that *Conley* involved review of the pretrial dismissal on double jeopardy grounds of a charge of conspiracy to commit money laundering, while this case involves review of a money laundering conviction.[2] That difference in procedural posture, however, does not reconcile the result and reasoning in *Conley* with the outcome in this case. In resolving the double jeopardy challenge in *Conley*, the court viewed its task as defining "the essential elements" of money laundering (37 F.3d at 976)—which is what the court did here. And the court held in *Conley* that the defendants' use of receipts from gambling machines to pay the expenses of the illegal gambling operation constituted a prohibited transaction with "proceeds" (*id.* at 980)—which is precisely what the court rejected here.

Respondents seek support (Br. in Opp. 17) from the statement in *Conley* that "money, once collected from the poker machines, became 'proceeds of specified unlawful activity' within the meaning of the money

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[2] The government acknowledges that the petition incorrectly stated (at 17) that *Conley* involved a conviction, but that has no bearing on the legal analysis.

laundering statute." 37 F.3d at 980. Far from supporting respondents, however, that statement contradicts their position. The money laundering charges that the court of appeals dismissed in this case were all based on transactions involving money that had been collected from the gambling machines.

Respondents do not dispute (Br. in Opp. 17-18) the government's contention that "[t]he outcome here also cannot be squared with numerous cases in which courts of appeals have found sufficient evidence to support money laundering convictions based on the use of receipts of illegal activity to compensate accomplices or to pay other costs incurred to conduct the activity." Pet. 18. Respondents instead note (Br. in Opp. 18) what the government has already acknowledged—that "the defendants in those cases did not argue that Section 1956(a)(1) prohibits only transactions involving net proceeds." See Pet. 19. The holdings of those cases nonetheless reflect the understanding—universally accepted until the decision here—that the money laundering statute prohibits the use of the revenue from criminal activity to pay for the overhead and expansion of that activity. Moreover, each of those cases would have been decided differently had the courts applied the definition of proceeds adopted by the Seventh Circuit in this case. This Court's intervention is warranted to bring the Seventh Circuit into line with the other courts of appeals.[3]

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[3] Respondents contend (Br. in Opp. 13-14) that the decision below is consistent with the Seventh Circuit's earlier decision in *United States* v. *Jackson*, 935 F.2d 832 (1991). But the decision below is *not* consistent with *Jackson*, in which the court held that "plowing back" revenues from unlawful activity does constitute money laundering, *id.* at 842, and applied that holding to the purchase of beepers to be used in drug activity, *id.* at 841.

3. The question presented is important.

Respondents incorrectly contend (Br. in Opp. 19) that the government has failed to show that "[t]he question presented is of recurring importance." Contrary to that contention, the factual scenario that raises the question presented is typical of money laundering prosecutions under the promotion subsection of the statute. As the multitude of cases cited in the petition demonstrates (see Pet. 13-14 n.2, 18-20), most of those prosecutions involve the use of revenue from criminal activity to pay the expenses of that activity or to fund its continuation or expansion. Those prosecutions are a critical part of the government's efforts to combat organized crime, illegal gambling, drug dealing, and fraud. Thus, even if the court of appeals' decision is read narrowly (see Br. in Opp. 12-13, 18), it constricts significantly the scope of the money laundering statute. And, if the decision is construed broadly, it will essentially eviscerate the promotion subsection of the statute. See Pet. 21.

However the decision is construed, it will impose unreasonable burdens on both the courts and the government. As explained above, courts will be required to establish accounting rules for illegal businesses, and, in order to prove a money laundering violation, the government will be required to establish that, under those accounting rules, the illegal businesses earned a profit. That task will be extremely burdensome because criminals rarely keep accurate accounting records. Respondents' reply to these concerns is that the government "has not cited any instance in which use of an accounting method has unduly stymied a money laundering prosecution." Br. in Opp. 14. That fact is not surprising, however, since no other court has yet

adopted the unworkable rule that the Seventh Circuit adopted here.[4]

Notably, respondents do not dispute that the burdens created by the Seventh Circuit's definition of proceeds will arise in *all* money laundering prosecutions, whether under the promotion or the concealment subsections of the statute. Thus, even when a transaction is explicitly designed to conceal or to disguise the illicit origins of funds, a defendant will evade conviction unless the government can demonstrate that the funds represent profits rather than gross receipts of criminal activity. Congress did not intend to impose that serious obstacle to effective enforcement of the money laundering statute, and this Court's intervention is necessary to prevent its imposition by the court of appeals.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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NOVEMBER 2002

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[4] Respondents also state that "[i]t does not take a Wharton's School of Business graduate to deduce that the charged money laundering transactions * * * were conducted with the gross receipts of gambling activity." Br. in Opp. 15. The government's point, however, is that it *would* take someone well versed in accounting principles, reviewing respondents' expense records, to ascertain whether those transactions were conducted with "net income" or "profits."